

IN THE MATTER OF THE ARBITRATION BETWEEN

INDEPENDENT SCHOOL DISTRICT NO. 115 CASS LAKE/BENA)	BMS NO. 06-PA-150
“EMPLOYER”)	
And)	DECISION AND AWARD
CASS LAKE EDUCATION ASSOCIATION)	RICHARD R. ANDERSON ARBITRATOR
“UNION”)	MARCH 20, 2006
)	
)	

APPEARANCES

For the Employer:

Jennifer K. Early, Attorney
Clarence (Todd) Chessmore, Superintendent of Schools
Steve Novak, Principal, Middle School and High School
Bethany Norberg, School Board Member
Pamela Mae Olson, Retired Elementary School Principal and Teacher

For the Union:

Rebecca H. Hamblin, Attorney
Russ Riley, Education Minnesota Field Staff Representative
Loretta Kloster, Grievant
Jeff Wiebe, Co-President Cass Lake Education Association and Teacher Rights
Representative
Luey Kane, Teacher Rights Representative

JURISDICTION

The hearing in above matter was conducted before Arbitrator Richard R. Anderson on January 30, 2006 in Cass Lake, Minnesota. Both parties were afforded a full and fair opportunity to present its case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. The hearing closed on January 30, 2006. Post-Hearing Briefs were simultaneously mailed on March 3, 2006 and received on March 4, 2006. This matter was then taken under advisement.

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement that was effective from July 1, 2003 through June 30, 2005.¹ The language in Article XV [GRIEVANCE PROCEDURE] provides for the filing, processing and arbitration of a grievance. Section 8 Subsection 6 of this Article provides that the Arbitrator is the sole decision maker in this matter. Section 8 Subsection 8 defines the jurisdiction of the Arbitrator. The parties stipulated that the grievance is properly before the undersigned Arbitrator for final and binding decision; however, the Employer, hereinafter the School District, argues that the Arbitrator's jurisdiction in this matter is limited by Section 8 Subsections 4 and 8.

BACKGROUND

The School District is an independent public school district located in the City of Cass Lake, Minnesota. The Union, which is affiliated with Education Minnesota, represents all of the School District's teachers. The bargaining unit is set forth in Article II [RECOGNITION OF EXCLUSIVE REPRESENTATIVE]. The parties have a history of collective bargaining dating back to 1973.

¹ Joint Exhibit No. 1

On May 19, 2005², the Grievant, Loretta Kloster, filed a grievance protesting the School District's May 2nd refusal to transfer her to the vacant Middle School Counseling position.³ Middle School Principal Steve Novak, who is also the High School Principal, responded to the Grievant by letter dated May 24th and denied the grievance along with School District's reasons for its denial.⁴ On May 31st, the Union appealed the grievance to Superintendent Clarence "Todd" Chessmore, pursuant to Step II of the grievance procedure.⁵ When Chessmore did not reply to the grievance by June 15th, the Union moved the grievance to the School Board on June 16th pursuant to Step III. Thereafter, the School Board in writing on July 11th denied the grievance along with its reasons for the denial.⁶ The Union then filed for arbitration on August 31st.⁷ The undersigned was notified of being selected as the neutral arbitrator by letter from the Union dated October 13th.⁸

THE ISSUE

There are three issues present in this matter. The School District raises procedural issues as to this Arbitrator's jurisdiction in this matter. The School District asserted at the hearing that the issues raised by the grievance are not arbitrable as the Grievant's assignment is within the inherent managerial rights of the School District pursuant to Article IV Sections 1 and 4[SCHOOL BOARD RIGHTS]. The School District in its Post-Hearing Brief also asserted that the issues raised by the grievance are not arbitrable as

² Unless otherwise indicated, all dates are in 2005.

³ Joint Exhibit No. 2-1

⁴ Joint Exhibit No. 2-2

⁵ Joint Exhibit No. 2-1, p. 2

⁶ Joint Exhibit No. 2-3-B

⁷ Joint Exhibit No. 2-4

⁸ Joint Exhibit No. 2-5

the Grievant failed to make the necessary submissions to the Arbitrator and the School District prior to the hearing pursuant to Article XV, Section 8 Subsection 4. The parties stipulated that if the Arbitrator asserts jurisdiction, the issue is whether the School District violated the provisions of Article XIV Section 2 [TRANSFER POLICY] of the Agreement when it did not hire the Grievant, Loretta Kloster, for the Middle School Counselor position; and if so, what is the appropriate remedy.

RELEVANT CONTRACT PROVISIONS

ARTICLE II. RECOGNITION OF EXCLUSIVE REPRESENTATIVE

Section 1: Recognition: *In accordance with P.E.L.R.A., the School Board recognizes the Cass Lake Education Association as the exclusive representative of teachers employed by the School Board of Independent School District No. 115 the exclusive representative, shall have those rights as prescribed by the P.E.L.R.A. and as described in the provisions of this Agreement.*

Section 2: Appropriate Unit: *The exclusive representative shall represent all the teachers of the district as defined in this Agreement and in said Act.*

ARTICLE 1V. SCHOOL BOARD RIGHTS

Section 1. Inherent Managerial Rights: *The exclusive representative recognizes that the school district is not required to meet and negotiate on matters of inherent managerial policy, which include, but are limited to, such area: of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organization structure and selection and direction and number of personnel.*

Section 2. Managerial Responsibilities: *The exclusive representative recognizes the right and obligation of the school district to efficiently manage and conduct the operation of the school district within its legal limitations and with its primary obligation to provide educational opportunities for the students of the school.*

Section 3. Effects of Laws, Rules and Regulations: *The exclusive representative recognizes that all employees covered by this Agreement shall perform the teaching services prescribed by the school district and shall be governed by the laws of the State of Minnesota, and by School District rules, regulations, directives and orders issued by the school district. The exclusive representative also recognizes the right, obligations and duty of the school district to promulgate rules, regulations, directives*

and orders from time to time as deemed necessary for the school district insofar as such rules, regulations, directives and orders are not inconsistent with the terms of this Agreement, and all provisions of the Agreement are subject to the laws of the State of Minnesota, Federal laws, rules and regulations of the State Board of Education, and valid rules, regulations and orders of State and Federal governmental agencies. Any provision of this Agreement found to be in violation of any such laws, rules, and regulations, directives or orders shall be null and void and without force and effect.

Section 4. Reservation of Managerial Rights: *The foregoing enumeration of district rights and duties shall not be deemed to exclude other inherent management rights and management functions not expressly reserved herein, and all management rights and management functions are expressly delegated in this Agreement are reserved to the School District.*

ARTICLE XIV. STAFF REDUCTION AND TRANSFER POLICY [2003-2005 Agreement]

Section 2. Transfer Policy: *The School District shall inform the exclusive representative of any openings on the staff in writing and by posting on the official bulletin board. To be considered for the opening, a teacher must apply in writing within 10 days of the posting date.*

Subd. 1. *Application by presently employed staff shall receive priority consideration and, as soon as a decision is made on the open position, a written response informing the applicant of the board's decision shall be made. If the applicant is denied the transfer, the reasons for such a denial shall be stated in the written response.*

Subd. 2. *In the case of more than one teacher applying for the same open position, the following criteria shall be used in order:*

- 1. Seniority*
- 2. Highest level of education*
- 3. Total experience in that field*

ARTICLE XIV. TEACHER REDUCTION AND TRANSFER POLICY [2005-2007 Agreement]

Section 2. Transfer Policy: *The School District shall inform the Exclusive Representative of any staff openings in writing through all school e-mail, by posting on the official bulletin board at each building site and summer payroll mailings. To be considered for the opening, a teacher must apply in writing within 10 business days of the posting date.*

Subd. 1. Involuntary Transfer: *When involuntary transfer or reassignments are necessary, qualified volunteers, if any, will be transferred or reassigned first. If no volunteer is available, the most senior teacher in the grade level or subject area of*

the position being transferred or reassigned, shall not be the teacher transferred or reassigned.

All transfers shall be given a minimum of three (3) paid days to organize.

Subd. 2. Voluntary Transfer:

All applications for voluntary reassignment and/or transfer will be filled on the basis of licensure and qualifications.

The supervisor of the open position shall have the right to deny such a transfer provided that the supervisor explains the reasons directly to the applicant, in writing, within five (5) business days. No request shall be denied arbitrarily, capriciously, or without basis In fact.

All transfers shall be given a minimum of three (3) paid days to organize.

ARTICLE XV. GRIEVANCE PROCEDURE

Section 1. Grievance Definition: *A “grievance” shall mean an allegation by a teacher resulting in a dispute or disagreement between the teacher employee and the school board as to the interpretation or application of terms and conditions of employment insofar as such matters are contained in this Agreement.*

Section 8. Arbitration Procedures: *In the event that the teacher and the school board are unable to resolve any grievance, the grievance may be submitted to arbitration as defined herein:*

Subd. 4. Submission of Grievance Information:

a. Upon appointment of the arbitrator, the appealing party shall within five days after notice of appointment forward to the arbitrator, with a copy to the school board, the submission of the grievance which shall include the following:

- (1) The issues involved.*
- (2) Statement of the facts.*
- (3) Position of the grievance.*
- (4) The written documents relating to Section 3, Article XV of the grievance procedure.*

b. The school board may make a similar submission of information relating to the grievance either before or at the time of the hearing.

Subd. 6. Decision: *The decision by the arbitrator shall be rendered within thirty days after the close of the hearing. Decisions by the arbitrator in cases properly*

before him shall be final and binding upon the parties, subject, however, to the limitations of arbitration decisions as provided by in the P.E.L.R.A.

Subd. 8. Jurisdiction: *The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of this procedure. The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined herein and contained in this written agreement; nor shall an arbitrator have jurisdiction over any grievance which has not been submitted to arbitration procedure as outlined herein; nor shall the jurisdiction of the arbitrator extend to matters of inherent managerial policy, which shall include but are not limited to such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, and selection and direction and number of personnel. In considering any issue in dispute, in its order the arbitrator shall give due consideration to the statutory rights and obligations of the public school boards to efficiently manage and conduct its operation within the legal limitations surrounding the financing of such operations. All matters of grievance will be dealt with as quickly and fairly as possible.*

FACTS

The Grievant is a long tenured professional employee who is currently employed as a School Counselor/Social Worker at the School District's elementary school. She has an undergraduate degree (BS) in psychology and Indian studies. She also has a graduate degree (MA) in education counseling and 40+ post-graduate credits in special education as well as in school law and philosophy. The Grievant is currently licensed by the State of Minnesota Department of Education for Grade 1-6 Elementary Guidance & Counseling, K-12 School Counselor and a pre K-12 School Social Worker.⁹ She is also has a Social Worker license issued by the Minnesota Board of Social Work.¹⁰

The Grievant was initially employed during the 1985-1986 school year as a K-12 Social Worker. She later obtained her School Counselor license and worked

⁹ Union Exhibit No. 7 p. 1

¹⁰ Union Exhibit 7 p. 2

as a Social Worker/School Counselor in grades K-12 during the 1995-1999 school years. In 1999 the School District hired a High School Counselor so the Grievant no longer had grade 7-12 responsibilities. The Grievant took a leave of absence during the 2000-2001 school year to take care of her mother in Northeastern Minnesota. During this time period she was employed on a .50 FTE or 1/2 time basis as a School Counselor for Grades K-12 in the Cook County Independent School District No. 166 school system. The Grievant returned to her former position for the 2001-2002 school year. Beginning in the 2001 school year, the School District created a Middle School comprised of grades 5-8; and in March 2002, the School District created a Middle School Counselor position. The Grievant applied, but was not awarded this position.¹¹ Instead, the School District hired an external applicant. After being rejected as the successful candidate, the Grievant inquired into the reasons. In response to the Grievant's query, Middle School Principal Steve Novak sent her the following letter dated September 12, 2002.¹²

This letter is in response to your letter of inquiry asking "Why you were not hired for the position of Middle School Counselor.

The selection criteria identified for the committee for the final selection were as follows:

- 1. does the candidate possess a Minnesota license in guidance and counseling at either the elementary or secondary level?*
- 2. does the candidate possess current experience at the middle school or junior high level?*
- 3. does the candidate possess experience in the following categories;*
 - a. student scheduling experience in software (i.e. jmc sasi, or other software)*

¹¹ It appears that the Grievant was the only internal candidate to apply.

¹² Union Exhibit No. 10-2

- b. career exploration activities with middle level/junior high students*
- c. current experience with state assessment testing process (setting up test, administering test, and reporting test results to students; staff; and parents)*
- d. current experience chairing and serving on special education middle level/junior high student committees*
- e. strong communication skills with middle level/junior high students*
- f. current experience in developing and implementing a middle level/junior high guidance program.*

The criteria identified above were used to help the committee identify two final candidates, and from those two candidates the committee unanimously identified one candidate to be recommended to the Board.

No grievance was filed over her non-selection. The Grievant's job responsibilities involved only grades K-4 after the hiring of the Middle School Counselor. The Grievant testified that these primary responsibilities included, *"individual and group counseling students, working with specific students who are in special education, help and develop individual (education) plans for special ed (education) students, and meet with various committees of student wellness teams to develop a referral plan for students who are in need of services both inside and outside the district"*.

On April 6th, the School District posted the vacancy for a Middle School Counselor position. The posting listed the following requirements:¹³

Master Degree with a major in counseling and guidance for Middle School.
Ability to coordinate and direct state/local tests.
Knowledge of middle school scheduling and career development programming.
Communication and technical skills to lead and direct student groups.
Knowledge of state/federal laws as they relate to student welfare and confidentiality
Ability to maintain professional relationships with staff, students, and parents.

¹³ School District 1

The Grievant and Senior High School Guidance Counselor Jennifer Voge, who had a seniority date of May of 2000, were the only two applicants for the position. Thereafter, a selection committee interviewed both candidates. On May 2nd, the Grievant was notified that she was not the successful applicant.¹⁴ The position was awarded to Voge, who initially accepted the transfer; but shortly afterwards declined it. On July 5th, Middle School Principal Novak sent a memorandum to Superintendent Todd Chessmore recommending that the position be re-posted both internally and externally.¹⁵ The position was re-posted, and neither the Grievant nor any other internal candidate applied. The position was subsequently awarded to an external applicant.

The Grievant was not initially apprised of the reason(s) she was not transferred to the Middle School Guidance Counselor position. The reasons were later set forth in a grievance response letter to the Grievant by Novak dated May 24th.¹⁶

Your involvement in high stakes testing has not been current. You do not have recent experience with test implementation and scheduling; setting up groups; explaining the testing program to staff, parents, or students: and analyzing test data.

You lack experience over current time with the middle school age group. Your scheduling experience is not current. You have not had scheduling experience with our present program.

Your recent work history in our district has been as a social worker and not a guidance counselor.

Evidence adduced at the hearing through Union witnesses disclosed that after the grievance was filed, Superintendent Chessmore initially was going to sustain the grievance at Step II because of the seniority provision in the Transfer language of the

¹⁴ Joint Exhibit No. 4

¹⁵ Union Exhibit No. 13

¹⁶ Joint Exhibit No. 2-2

Agreement, and even conveyed this fact to the Union. However, he later changed his initial decision.¹⁷ Chessmore testified that he vacillated on the grievance because, having recently assumed his position, he was not familiar with the application of the Transfer provisions in the Agreement. Evidence also disclosed that Voge was very upset that the Union was contesting her transfer and withdrew her appointment.

Principal Novak testified that the position of Middle School Counselor has a multitude of job duties.¹⁸ Two job duties in particular, student testing and student scheduling, consist of two-thirds of the responsibilities of the Middle School Counselor position. Novak further testified that since the advent of the No Child Left Behind Act Federal legislation and new State academic standards enacted in 2001 with required implementation in the 2002-2003 school year, the Middle School Counselor's responsibilities involving testing have increased significantly. Students at the Middle School have been required to undergo "high stake" testing approximately four times a year since the new academic standards were implemented. In addition, the Middle School is the only school in the School District where such tests have to be administered to each grade level. According to Novak, the Middle School Counselor is not only responsible for administering the tests and training test proctors, but also analyzing and interpreting the tests as well as ensuring that test security is maintained. Novak further testified that the Middle School Counselor's role in preparing students for the tests and ensuring that the tests are properly administered

¹⁷ Union Exhibit No. 5

¹⁸ Citing the Guidance Counselor job description. Joint Exhibit 3-2

and analyzed is extremely important in ensuring that the School District is not subjected to funding reductions and/or other penalties.

The Grievant testified that she also has been involved in various testing procedures including interpreting and analyzing test data during her tenure with the School District including the time period prior to 1999, some of which were at the High School level. These included MAP (Measures Academic Progress), MCA (Minnesota Comprehensive Assessment), and BST Basic Skills Test). She also testified that she had experience with various testing including SAT (Standards Achievement Test), ACT (American College Test), LEPT (Limited English Proficiency Test) and various interest inventories involving career interests while at Cook County. Under cross-examination, she testified that except for the ACT testing at Cook County, which was done once, she had help in the administration of all of the aforementioned tests. It also appears that most of the testing experience was working under the mentorship of the High School Counselor during her early School Counselor training.

The Grievant disclosed during her testimony that she did not have "high stake" testing experience and was not familiar with the term. Former Elementary School Principal Pamela Mae Olson testified that testing was not one the Grievant's primary responsibilities, rather, her primary role in the School District was that of a Social Worker. Olson also testified that the teacher responsible for annual MCA and the tri-annual MAP testing was the Title I lead teacher not the Grievant since the tests involved Title I functions.

Novak also testified that student scheduling experience and experience in the computerized scheduling program utilized by the School District is vital to the Middle

School Counselor position. The School District has a complicated "JMC"¹⁹ computerized scheduling program that can be difficult to master efficiently and is far more sophisticated than the "CAMPUS" computer program the Grievant was involved with at Cook County.

The Grievant testified that she was involved in student scheduling both at the School District and at Cook County. While at Cook County she helped students register for classes and determined what classes they were qualified for. She was involved in utilizing CAMPUS, a computer program that monitors individual student academic careers including class schedules, attendance, discipline and report cards. She further testified that while at the School District, she did group and individual counseling, helped students with scheduling and academic and career activities. She also had some "JMC" computer program scheduling experience, however, it was limited to helping the Elementary School Secretary on occasion input data.

Evidence adduced at the hearing through Novak's testimony also disclosed that one of the reasons the Grievant was not transferred was that she would need substantial training in order to perform the key testing and student scheduling functions demanded in this new position. Novak testified that he would be the key individual responsible for this function and would take an inordinate amount of time, which he did not have. Due to budgetary considerations, his time would be limited since he was both the Principal at the Middle and High Schools. According to Novak, training the Grievant would impact significantly on his responsibilities and duties at the Middle School.

¹⁹ JMC are the initials of the two individuals who developed the program.

Novak also testified that another consideration in not transferring the Grievant was her key involvement in the School District's new Early Reading Program. This reading program was and continues to be an integral part of the Grievant's job duties, involving approximately one half of her Social Work job duties. The School District had just received a significant federal grant to fund an early reading program. The Grievant played a significant role in receiving this grant. As part of the application process, the School District had to certify that it had qualified, experienced and trained staff to operate the program. The School District specifically listed the qualifications of the Grievant.²⁰ Olson testified that it would be extremely difficult to find a replacement with the Grievant's qualifications, and the reading program would be in jeopardy since the program relies on the federal grant for funding.

Finally, the evidence disclosed that prior to 1979, there had been no provision involving "transfers".²¹ The negotiated Transfer provision in the 1979-1981 Agreement contained the identical language involving "selection by seniority" that is contained in Article XIV Section 2 Subsection 2²² of the Agreement.²³ This language was completely modified in the 2005-2007 Agreement. The Transfer provision in the new Agreement now contains both "involuntary" and "voluntary" transfer language; and rather than seniority, the selection criteria is on the "*basis of licensure and qualifications*". There is also additional language in the provision that states; " *The supervisor of the open position shall have the right to deny such a transfer provided*

²⁰ School District Exhibit No. 3

²¹ Collective bargaining agreement for 1977-1979. Union Exhibit No. 2

²² Unless otherwise stated, hereinafter all reference to a Section will be in Article XIV and reference to a Subsection will be in Section 2.

²³ Union Exhibit No. 3

*that the supervisor explains the reasons directly to the applicant, in writing, within five (5) business days. No request shall be denied arbitrarily, capriciously, or without basis in fact".*²⁴

POSITION OF THE UNION

Arbitral Issues

The Union disagrees with the School District's position that the Arbitrator lacks jurisdiction in this matter because of the School District's exclusive inherent managerial authority to assign teachers to positions. The Union agrees that the School District would have the exclusive inherent managerial right in the assignment of teachers to positions if this were the only relevant contractual language. The School District, however, in agreeing to the language in Section 2 ceded this inherent managerial right in the specific area of transfers.

The Union's position on the Employer's other procedural issue involving its non-adherence to the Grievant's submission requirements pursuant to Article XV Section 8, Subsection 4, is that the Arbitrator should not consider this issue. The Union argues that this issue was not raised at the arbitration hearing and its first knowledge of the issue was in the School District's Post-Hearing Brief.

Substantive Merits Issue

The Union's position on the substantive merits of the grievance is that the School District violated Section 2 when it failed to transfer the Grievant to the vacant Middle School Counselor position. The Union argues that the School District's whole case was premised on the Grievant being less "qualified" or "unqualified" for the position as

²⁴ Union Exhibit No. 6

compared to Voge. The term or criterion "qualified" or "most qualified" are not even in the language. The fact is that both individuals were legally qualified since they both had the proper license to fill the position; however, it was the Grievant who was entitled to the position based on her seniority. The Union further argues that Subsection 2 clearly establishes seniority as the number one criterion in the selection process when two or more internal candidates apply.

The Union concedes that there is nothing in the language of Section 2 that limits the School District's ability to post a position both internally and externally. While the Transfer provision requires that all openings must be posted internally, there is no limitation on the School District's ability to also post externally. The Union argues, however, that contrary to the School District's assertions, the language of the two subdivisions cannot be read together, as the School District claims, since they lead to diametrically opposite results. Subdivision 1 states that internal candidates "shall" receive "priority consideration", the key word being "consideration". There is nothing in this Section that mandates selection of an internal candidate. On the other hand, Subdivision 2 states that if more than one teacher applies for the same open position, the following criteria shall be used in the following order: *(1) Seniority; (2) Highest level of education; and (3) Total experience in that field.*

If Subdivision 2 applied when there were both internal and external applicants, then internal candidates would always be selected because they would always have more seniority. Subdivision 1, however, makes it clear that when there are both internal and external applicants, the School District retains the discretion to choose an external applicant. The only way to read these subdivisions is to give meaning to

both: Subdivision 1 applies when there are both internal and external applicants and the School District has discretion to post externally and to choose to hire an external applicant, while Subdivision 2 applies when there are only internal applicants. When the School District only posts a position for internal candidates, it has through the collective bargaining process, given up its inherent managerial discretion; and the negotiated selection criteria must be applied in the stated order.

Thus, the Grievant, whose seniority date is September 1985 while Voge's date is May 2000, should have been transferred to the vacant Middle School Counselor position. Two internal and no external applicants applied; therefore under Subdivision 2, the applicant with the greatest seniority (criterion no. 1) should have been selected for the transfer. Even if the other two criteria were to be considered, the Grievant had a higher level of education and more experience as a School Counselor than Voge.

The Union points out that there was no testimony regarding the history of bargaining adduced at the hearing; however, the School District in the past has applied its Transfer policy consistent with the Union's argument herein. Two internal candidates, Luey Kane who had a seniority date of July 1986 and Jay Lehman who had a seniority date of January 2004 applied for a transfer to a vacant position in the Alternative Learning Center (ALC) during the middle of the 2004-2005 school year. Luey testified that when she learned that she had to be interviewed for the position, she objected to this process to ALC Director Chase, citing the Agreement required the School District to give her the position based solely upon her earlier seniority date.

According to Luey²⁵, Chase later came back and informed her that Chessmore agreed that she did not have to be interviewed and was given the transfer.

The Union also argues that the Grievant is qualified for the position of Middle School Counselor by virtue of her Counselor license and any additional qualifications of the Grievant are irrelevant. She has a Master's Degree in Educational Psychology and has taken many courses in counseling. She has counseled students of all age levels over the course of her career. She has counseled School District students at both the high and middle school grade levels from approximately 1994, when her title changed from Social Worker to Counselor/Social Worker, until the District opened the Middle School and she no longer was assigned to work with middle school students. The Grievant also worked as a half-time (.50 FTE) High School Counselor at Cook County School District High School during the 1999-2000 school year.

Finally, the Union argues that to the extent that the School District has concerns that the Grievant needs to learn more about student testing, it should provide any training and/or resources that she needs to enhance these skills. The Grievant has had varying job duties and worked with all different ages of K-12 students. There is no reason she cannot learn any additional skills that are needed to be a Middle School Counselor.

²⁵ Hearsay testimony.

POSITION OF THE EMPLOYER

Arbitral Issues

The School District's position is that the Arbitrator has no jurisdiction in this matter. The School District argues that the parties negotiated the Management Rights provision in Article IV of the Agreement whereby the Union agreed that the *"school district is not required to meet and negotiate on matters of inherent managerial policy, which include, but are limited to, such area: of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organization structure and selection and direction and number of personnel"*. Therefore, the School District has the exclusive jurisdiction in determining the *"selection...of personnel"*. Article XIV Section 8 Subsection 8 clearly provides that, *"The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined herein and contained in this written agreement, ..., nor shall the jurisdiction of the arbitrator extend to matters of inherent managerial policy"*. Thus, the grievance involving the Grievant's transfer is not arbitrable under the provisions of the Agreement and the Arbitrator has no jurisdiction to decide the grievance.

The School District also raises the position that the grievance is not arbitrable since the Grievant failed to make the necessary submissions to the Arbitrator and the School District prior to the hearing pursuant to Article XV, Section 8 Subsection 4. The Employer argues that Article XIV Section 8 Subsection 4 requires that, *"Upon appointment of the arbitrator, the appealing party shall within five days after notice of appointment forward to the arbitrator, with a copy to the school board, the submission of the grievance which shall include the following:(1) The issues involved. (2)*

Statement of the facts. (3) Position of the grievance. (4) The written documents relating to Section 3, Article XV of the grievance procedure".

Article XIV Section 8 Subsection 8 clearly provides that, "*The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined herein and contained in this written agreement; nor shall an arbitrator have jurisdiction over any grievance which has not been submitted to arbitration procedure as outlined herein...*". Thus, the grievance involving the Grievant's transfer is also not arbitrable under the provisions of the Agreement and the Arbitrator has no jurisdiction to decide the grievance.

Substantive Merits Issue

The School District's position is that it did not violate the Agreement as alleged in the grievance; and therefore, it has no merit. The School District argues that its ability to direct its personnel is a fundamental requirement to operate efficiently; and if divested of this right, its ability to budget its resources and staff in programs will be affected. This is the reason that Article IV and Article XV were negotiated into the Agreement. They were negotiated to specifically reserve this decision-making process to the School District.

The School District also argues that it has the absolute right to determine whether or not an employee is qualified for a position, regardless of the employee's seniority. The Union's argument that in awarding a position, the School District is required to consider the qualifications of the applicants in the following preferential order: seniority, highest level of education and total experience in the field; and that by failing to select the Grievant based on her seniority, the School District violated the

Agreement. While the School District does not contest that it is bound to consider these three factors, it argues that this does not negate its exclusive inherent managerial right to determine the necessary qualifications of employees in filling positions. In fact, the Union through its Local Union Co-President Jeff Wiebe conceded at the hearing that the School District has the right to make the determination as to whether an employee is qualified for a position before considering his/her seniority. Wiebe also acknowledged that if the School District determined that none of the applicants for a position possessed the necessary qualifications as determined by the School District, it could reject all applicants, re-post the position or hire an external applicant.

The School District further argues that the Agreement clearly spells out that a current employee is only to receive "priority consideration" for an open position. Said language is deemed to be a "modified seniority clause", which requires that a position be awarded to a senior candidate only so long as the candidate has the ability to perform the work. Thus, the Agreement clearly conveys the intent that an employee must be deemed to be qualified for a position before the issue of seniority even arises. Clearly, the School District must consider seniority as a factor in reviewing the qualifications of an applicant; however, the School District is still the final authority for determining the qualifications required to fill a position and whether an applicant meets these requirements. Since this right is vested with the School District, the Arbitrator does not have jurisdiction to require that the Grievant be placed in a position for which the School District has determined she is not qualified. This right cannot be challenged so long as the qualifications and/or the determination are not arbitrary,

capricious, discriminatory, clearly wrong, made in bad faith or contrary to the contract. In the instant matter, the School District properly determined that the Grievant did not have present or relevant knowledge or training or experience in testing and scheduling, the areas and duties deemed most necessary for the position. She also did not have recent experience in counseling Middle School (grade) students.

Finally, the School District argues that the Union has recognized its right to reject internal candidates and hire external candidates. This is what happened in 2002 when the Grievant applied for the same position. The School District rejected her transfer request because she was not qualified and hired an outside candidate. No grievance was ever filed. Moreover, if the School District can reject an internal candidate because of a lack of qualifications and then hire an outside applicant, why should it be prohibited from rejecting a more senior internal applicant because of a lack of qualifications and hire a less senior applicant with the required qualifications.

OPINION

Arbitral Issues

As stated earlier herein, the School District raised two procedural arbitrable issues, both involving this Arbitrator's jurisdiction in this matter. First, the School District, contrary to the Union, alleged at the hearing that the issue raised by the grievance is not arbitrable since the assignment of positions is within its exclusive inherent managerial right pursuant to Article IV Sections 1 and 4 and Article XV Section 8 Subsection 8 of the Agreement. Second, the School District, contrary to the Union, alleged in its Post-Hearing Brief that the grievance is not arbitrable under Article XV Section 8 Subsection 8 of the Agreement since the Grievant failed to make the

necessary submissions to the Arbitrator and the School District prior to the hearing required by Article XV, Section 8 Subsection 4.

In addressing the School District's procedural argument regarding the alleged Union's grievance procedure impropriety, it is clear that this issue was never raised nor was any evidence adduced regarding this specific issue during the course of the hearing. Further, this arbitrability issue is not inextricably intertwined with, or an extension of, or even closely related to the arbitrability issue raised by the School District at the hearing. The School District should have raised this issue at the hearing; and its failure to do so, thereby, constitutes a waiver of its right to have this Arbitrator consider it.²⁶

In addressing the School District's procedural arbitrability issue raised and litigated at the hearing, there is no merit in its contention that the grievance is not arbitrable. The School District asserts that it has the exclusive inherent managerial right in teacher selection under Article IV. The Union, meanwhile, asserts that the language in Section 2 governs this process. Thus, the parties are both contending that different specific provisions in the Agreement governed the assignment of the vacant Middle School Counselor position in May 2005.

The School District is correct in that the express language of the Agreement's Management Rights clause gives it this exclusive authority. However, contrary to the School District's assertion, the Management Rights clause is not per se all-inclusive or

²⁶ The School District provided no evidence in its Brief to support this allegation. Even assuming that it had, my decision would not change since it is apparent that any evidence presented could hardly be deemed "newly discovered", which under some circumstance could constitute mitigation. In this situation, the School District was one of the parties that should have received the information and should have been aware of this alleged breach, especially since there was a lengthy time period of approximately three months between when the information should have been received and the date of the hearing.

definitive. In order to resolve this issue, the Management Rights clause must be interpreted and further analyzed to determine if the Employer's actions are either consistent with or in conflict with other provisions in the Agreement. In other words, does the Management Rights clause grant the Employer exclusive jurisdiction to select and or transfer teachers or are there other provisions in the Agreement that also govern this process. An examination of the Agreement discloses that in addition to the Management Rights clause, the Agreement also contains a Transfer provision. Both provisions need to be examined to determine whether the School District violated Article XIV, as the Union argues; or as the School District argues, it had an exclusive inherent management right under Article IV to fill the vacant Middle School Counselor position. In order to resolve this issue an interpretation and application of the Agreement is necessary. To preclude the arbitration would also preclude an examination on whether the Agreement had been violated. This is a classic contract interpretation issue that this Arbitrator has jurisdiction over.

Substantive Merits Issue

Having concluded that the issues raised by the grievance are arbitrable, it is appropriate to address the merits of the grievance. As stated above, the issues before this Arbitrator entail contract interpretation. The burden of proof is on the Union to establish that the School District breached the Agreement when it failed to transfer the Grievant to the vacant Middle School Counselor position in May of 2005. Based on the evidence, the Union has failed to sustain its burden for the reasons set forth hereinafter.

The Union argues that Subsection 2 required the School District to transfer the most senior applicant (the Grievant) to a vacant position when more than one internal teacher applied for the same position. The language in Section 2 describes the procedure that governs the transfer of bargaining unit teachers to a vacant position. The main body of Section 2 spells out the posting procedure and application process. Subsection 1 gives priority consideration to current staff members and contains the decision notification process. Subsection 2 contains the criteria and order of hierarchy in the teacher selection process when more than one current teacher applies.

The language in the main body of Section 2 is clear and unambiguous as is the language in Subsection 1. The Union argued that Subsection 1 should be interpreted as being applicable when external teachers apply and Subsection 2 applies when internal teachers apply. I disagree.²⁷ The clear and unambiguous language does not establish this. Only teachers in the bargaining unit are covered under the Agreement. It is clear then that the Transfer provision in the Agreement can only apply to bargaining unit teachers unless it is clearly embodied otherwise in the provision, which it is not; or the parties have reached such an understanding, which they have not.²⁸ Nevertheless, the aforementioned provisions are not in issue in these proceedings.²⁹ What is in issue is the language in Subsection 2 that outlines the selection criteria and its prioritized order. The language states, "*In the case of more than one teacher applying for the same open position, the following criteria shall be used in order: (1) Seniority; (2) Highest level of education; and (3) Total experience in that field.* This

²⁷ I see no basis or relevance in this argument since the issue before me only involves internal applicants. It also has no basis or relevance based upon my later findings herein.

²⁸ The selection process involving external teachers is outside the Agreement.

²⁹ Neither party is contending that the other party breached any obligation under these provisions.

literal language is clear and unambiguous. It can have no other meaning. It states that when there is more than one applicant for a vacant position, the selection process that governs the transfer or selection of an applicant in order is seniority, then educational level and then experience.

Based solely on the literal language of this provision, the Grievant would be entitled to the vacant Middle School Counselor position. However, such is not the case herein. There are also prerequisites or conditions precedent that govern the teacher selection process and affect the implementation of Section 2, specifically Subsection 2. For example, the School District can hire an external teacher applicant even if internal applicant(s) apply for a transfer under Section 2. The Union, through the testimony of Local Union Co-President Wiebe, agreed that the School District can and has hired an external applicant even when there was more than one internal applicants for a teacher position. In fact, the evidence established that the Grievant was involved in this same scenario. In March 2002, she was an internal applicant for this same vacant Middle School Counselor position that was ultimately awarded to an external applicant. In this circumstance, the parties agreed that the School District was not bound by the procedures in Subsection 2. In doing so the School District invoked its inherent managerial right in deciding to hire an external teacher applicant rather than using the Agreement's Transfer procedures.³⁰ No grievance was ever filed over this action.

³⁰ There is no contractual proscription against the School District hiring outside applicants, whether or not an internal applicant(s) applies.

Another condition precedent is that an individual must be "qualified" for the position that he/she is seeking. It would be ludicrous to suggest that the School District could be forced via seniority to award a highly skilled School Counselor position to an "unqualified" applicant. While there is no language in the Agreement specifically governing qualifications, there is a presumption that the applicant must be "qualified" for the position that he/she is seeking. In fact the Union, through Wiebe, conceded that the School District did not have to hire an "unqualified" applicant for a position. Further, the parties changed the language in Section 2 in the new Agreement to specifically include this previous understanding. The first sentence in new Subsection 2 states, "*All applicants for voluntary reassignment and/or transfer will be filled on the basis of licensure and qualification*".

Thus, it is axiomatic then that a teacher must be "qualified" before the teacher fills an open position. The question then becomes, who determines the qualifications for a particular position. The State sets certain qualification standards before a teacher is licensed to teach students in Minnesota public schools.³¹ Additionally, the State requires that a teacher be certified as a School Counselor before he/she can perform those functions.³² Although the State sets these qualifications, the School District, by law, is mandated to accept the State qualification standards and requirements before filling a position.

The School District can also impose additional qualifications for a particular position. This right inures from the Management Rights clause in the Agreement.

³¹ Minnesota Statute Chapter 122A

³² Minnesota Rule 8170.6400

Absent negotiated restrictive language to the contrary, a public employer such as the School District is vested with the exclusive inherent managerial right to determine the qualifications of a teacher position. There is no such restrictive language in the Agreement, and, therefore, the School District is free to set the qualifications required for the vacant Middle Counselor position.³³ This is precisely what the School District did in its April 6th posting for the Middle School Counselor position.³⁴ When the School District established the qualifications for the vacant Middle School Counselor position, the Union never challenged the qualifications or the School District's right to establish the qualifications.³⁵

The Union is arguing is that the Grievant was "qualified" for the vacant position and there is no requirement that the Grievant be the "most qualified". The Union further argues that the Grievant possessed all of the requirements listed in the April 6th posting and should have received the vacant Middle School Counselor position by virtue of her seniority. The School District argued that although the Grievant, possessed a School Counselor license, she lacked the required qualifications for the position. Therefore, it was within its right to award the position to a less-senior applicant.

Unrefuted evidence by the School District disclosed that two thirds of the job requirements of the Middle School Counselor position involved testing, particularly "high stake" testing and scheduling students with the assistance of its "JMC" computer

³³ It should be noted that the Union is not specifically challenging the right of the School District to set position qualifications.

³⁴ The same is true when it determined the qualifications needed for the same position in 2002.

³⁵ The Union could have challenged the qualification requirement(s) if said requirement(s) were arbitrary, capricious, discriminatory, clearly wrong, made in bad faith or contrary to the contract.

program. The evidence also disclosed that while the Grievant was involved in some test procedures and scheduling using a computer program "CAMPUS", this testing experience was limited; and admittedly, the Grievant had no "high stake" testing experience. The evidence further disclosed that the Grievant's testing experience was not recent. The evidence also disclosed that, while the Grievant had some experience in counseling and scheduling students in the middle grades, this experience was not current; and she possessed limited, if any, experience in using the School District's computer based scheduling system. Finally, the evidence disclosed that the Grievant had been rejected for this same position in 2002 for the same reasons (lack of qualifications) that the School District rejected her this time. There is no evidence that the Grievant, after being rejected in 2002, ever sought to acquire or further develop the qualifications the School District deemed necessary for the position.

The Union argued that the Grievant could have met the School District's stringent qualifications with training. This may be true, however, there is no contractual right requiring transfer training or was there any evidence adduced at the hearing that the School District was obligated to provide such training. Further, the unrefuted evidence disclosed that Novak did not have the necessary time to fulfill this job function because of his dual Principal responsibilities.³⁶

The School District argued, and this Arbitrator agrees, that it had the exclusive inherent managerial right to determine if an applicant met its qualification requirements. As with its exclusive right to set the qualification requirements, the same exclusive right to determine if an applicant possessed those qualifications inures

³⁶ Novak gave unrefuted testimony that he was the primary person responsible for said training.

from the Management Rights clause regarding selection of personnel. There is no restrictive or other provision that would modify this exclusive inherent managerial right. The School District determined that the Grievant did not possess the current qualifications it deemed vital for the position.³⁷ So long as its determination was not arbitrary, capricious, discriminatory, clearly wrong, made in bad faith or contrary to the contract, this Arbitrator has no authority to question the School District's decision on her lack of qualifications. Once the School District determined that the Grievant was not qualified for the vacant Middle School position, Subsection 2 was not applicable.

CONCLUSION AND FINDINGS

I conclude that the School District's procedural arbitrability arguments are without merit for the reason stated herein and the assertion of jurisdiction is appropriate. Having asserted jurisdiction, I find that the grievance is arbitrable.

I also conclude that Article XIV Section 2 Subsection 2 requires the School District to select the most senior applicant for a vacant position, but only if said applicant is "qualified" for the position. I further conclude that the School District has the exclusive inherent managerial right pursuant to Article IV to determine the qualifications required for a vacant position, and whether or not an applicant possesses said qualifications. I further conclude, that inasmuch as the Grievant did not possess the necessary qualifications for the vacant Middle School Counselor position as determined by the School District, the provisions of Article XIV Section 2 Subsection 2 did not arise. Finally, I conclude that the School District did not violate Article XIV Section 2

³⁷ The evidence also supports the School District's determination.

Subsection 2 of the Agreement. Having so concluded, I find that there is no merit to the grievance.

AWARD

IT IS ORDERED that the grievance be and is hereby denied in its entirety.

**Dated: March 20, 2006
In Eagan, Minnesota**

**Richard R. Anderson
Arbitrator**